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MICHAEL RODAK, JR., C

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

ABBY GAIL LASSITER,
Petitioner,

v.

DEPARTMENT OF SOCIAL SERVICES OF
DURHAM COUNTY, NORTH CAROLINA
Respondent.

On Writ of Certiorari to the North Carolina Court of Appeals

BRIEF OF THE AMERICAN BAR ASSOCIATION AMICUS CURIAE

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QUESTION PRESENTED BY AMICUS

Whether the Fourteenth Amendment Due Process Clause requires that indigent parents be afforded counsel in proceedings to terminate their parental rights.

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Children's Defense Fund, *Children Without Homes* (1979)	11
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Gruber, A., *Children in Foster Care, Destitute, Neglected . . . Betrayed* (1979) 10
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Levine, *Caveat Parens: A Demystification of the Child Protection System*, 35 U. Pitt. L. Rev. 1 (1973) 14
Maas, H. and Engler, R., *Children in Need of Parents* (1959) 17
Mnookin, *Foster Care—In Whose Best Interest?* 43 Harv. Educ. Rev. 599 (1973) 9
Model Adoption Legislation and Procedures Advisory Board, *Model State Adoption Act and Model State Adoption Procedures*, 45 Fed. Reg. 10622 (1980) 20
National Advisory Committee on Criminal Justice Standards and Goals, *Juvenile Justice and Delinqency Prevention* (1976) 20
National Commission on Children in Need of Parents, *Who Knows? Who Cares? Forgotten Children in Foster Care* (1979) 9, 14
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Schetky, Morrison & Sack, *Parents Who Fail: A Study of 51 Cases of Termination of Parental Rights*, 18 J. Am. Acad. Child Psych. 366 (1979) 10
State of North Dakota—*North Dakota Judicial Council Annual Report Calendar Year 1977*.... 18
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BRIEF OF THE AMERICAN BAR ASSOCIATION AMICUS CURIAE

INTEREST OF AMICUS CURIAE

The American Bar Association is a voluntary, national membership organization of the legal profession. Its more than 260,000 members come from every state, territory, and the District of Columbia. Since its inception over 100 years ago, the Association has taken an active interest in the improvement of the administration of justice and the judicial process.

As part of its activities to strengthen the legal system, the Association has issued several sets of comprehensive standards. These cover the juvenile justice system, the criminal justice system, and judicial administration. These Standards all address, in some degree, the basic issue which now appears before the Court. The *Juvenile Justice Standards*, in particular, enunciate the Association's views on the principles of law presented in this *amicus curiae* brief. The Standards, adopted in February of 1979 by the Association's House of Delegates, represent eight years of research, drafting, and critiquing under the aegis of a Joint Commission of the American Bar Association and the Institute of Judicial Administration. They reflect the work of hundreds of contributors, including lawyers, judges, and recognized experts in related fields such as social work, psychology, education, sociology, psychiatry, corrections, law enforcement and health care.

The Association's interest, however, goes beyond its efforts to articulate standards. The procedural principle at issue in this case touches upon key facets of the legal profession's role and responsibilities in relation to indigent defendants. As the national association of the legal profession, with a membership exceeding one out of every two practicing lawyers, the outcome will have a tangible impact on the work and professional practice of thousands of our members. It will, in certain respects, define or alter the professional duties to which the law and various codes of professional responsibility hold us accountable.

The members of the Association's Family Law, Criminal Justice, and Individual Rights and Responsibilities Sections, as well as its Young Lawyers Division, have accorded special attention to the nation's family and juvenile court systems. Moreover, the Association's Young Lawyers Division sponsors a National Legal Resource

Center for Child Advocacy and Protection. This Center focuses on many of the legal problems indicated by the case.

The Association, with the written consent of the parties,[1] respectfully sets forth its views herein on the important question of whether indigent parents are entitled to counsel in cases to terminate their parental rights.

SUMMARY OF THE ARGUMENT

This Court has consistently recognized that the liberty interest of parents in the preservation, integrity and protection of the family commands constitutional protections against undue state interference. State imposed termination of parental rights is an extreme deprivation of a basic human right; it permanently dissolves all rights, duties and pleasures derived from the parent-child relationship. Yet, notwithstanding the importance of this relationship and the severe consequences of its severance, studies have demonstrated that proceedings to involuntarily terminate the parent-child relationship are prone to error. According to these studies, this error arises from several characteristics common to termination proceedings, including:

—the lack of uniform judicial criteria,

—the subjective nature of decisions,

—misplaced reliance on overworked and ill-trained social service workers, and

—failure of state agencies to provide rehabilitation services to families under their investigation.

In order to minimize these factors and ensure a fair hearing, procedural due process demands that counsel be

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[1] Copies of letters indicating the parties' consent have been filed with the Clerk of the Court.

made available to parents, and that if the parents are indigent, it be at public expense. Counsel's crucial role in these matters is evidenced by studies which contrasted the dispositions between parents with and without counsel in termination proceedings: the represented parents had far greater success in maintaining the vital parent-child relationship.

Furthermore, the additional cost of providing counsel in these proceedings should be small. Already, by legislation or court decision, a majority of the states provide indigent parents with counsel in involuntary termination of parental rights proceedings. In the remaining jurisdictions, the available statistical data suggests that these cases comprise a minute portion of a state's judicial caseload, often one or two percent of the total criminal docket. Under these circumstances, a state's assertion of budgetary considerations must succumb to the parents' liberty interest in the continued relationship with their children.

ARGUMENT

I. THE RIGHT OF PARENTS TO A CONTINUED RELATIONSHIP WITH THEIR CHIDREN IS A LIBERTY INTEREST PROTECTED BY THE CONSTITUTION.

Over the past 60 years, the Court has had frequent opportunity to scrutinize state intervention into family matters. On each occasion the Court has zealously guarded familial relationships and integrity, according them protections under the Constitution.

The Court has repeatedly recognized family rights, describing them as an "essential right," *Meyer* v. *Nebraska*, 262 U.S. 390, 399 (1923), the "basic civil right of man," *Skinner* v. *Oklahoma*, 316 U.S. 535, 541 (1942), "[r]ights far more precious than property rights," *May*

v. *Anderson*, 345 U.S. 528, 533 (1953), or "fundamental rights," *Griswold* v. *Connecticut*, 381 U.S. 479, 495 (1965) (Goldberg, J., concurring). In short, it is beyond question that the preservation of the family unit is a liberty interest which enjoys protected status under the Due Process Clause of the Fourteenth Amendment. *Quilloin* v. *Walcott*, 434 U.S. 246 (1978); *Moore* v. *City of East Cleveland*, 431 U.S. 494 (1977); *Smith* v. *Organization of Foster Families for Equality and Reform*, 431 U.S. 816 (1977) (hereinafter cited as *Smith* v. *OFFER*); *Roe* v. *Wade*, 410 U.S. 113 (1973); *Stanley* v. *Illinois*, 405 U.S. 645 (1972); *Pierce* v. *Society of Sisters*, 268 U.S. 510 (1925).[2]

More specifically, in the context of this case, the Court has held that parents are entitled to a hearing on their fitness as parents before the state may take custody of their children. *Stanley* v. *Illinois*, *supra*. Having thus recognized that the parents' liberty interest in the "companionship, care, custody and management of [their] children" merits due process protection, the inquiry now turns to the essential components of that protection. *Stanley* v. *Illinois*, *supra*, 405 U.S. at 651.

II. THE FOURTEENTH AMENDMENT DUE PROCESS GUARANTEE ENTITLES PARENTS TO COUNSEL IN PROCEEDINGS TO TERMINATE THE PARENT-CHILD RELATIONSHIP.

This Court has frequently reiterated that due process is flexible and "calls for such procedural protections as the particular situation demands." *Morrissey* v. *Brewer*, 408 U.S. 471, 481 (1972). *See, also, Goldberg* v. *Kelly*,

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[2] Other Constitutional protections have been extended to the family unit. *See, e.g., Zablocki* v. *Redhail*, 434 U.S. 374, 384 (1978) (Equal Protection under the Fourteenth Amendment); *Griswold* v. *Connecticut*, *supra*, 381 U.S. at 496 (privacy right under the Ninth Amendment).

397 U.S. 254, 263 (1970); *Cafeteria and Restaurant Workers Union* v. *McElroy*, 367 U.S. 886, 895 (1961). In *Matthews* v. *Eldridge*, 424 U.S. 319, 335 (1976), the Court identified three factors that must be considered in determining whether a prescribed procedure meets the requirements of due process: First, the private interest that will be affected by the official action; second, the risk of an erroneous decision under the challenged procedure and the probable value of additional procedural safeguards; and third, the countervailing interest in support of the challenged procedure. This test has been utilized by the Court in the specific context of state-family conflicts. *Parham* v. *J.R.*, 442 U.S. 584 (1979); *Smith* v. *OFFER*, *supra*, 431 U.S. at 847-48.

A. Private Interest.

This Court has long emphasized the substantial interest in preserving family integrity. *See* Part I, *supra*. In its consideration of other due process questions the Court has differentiated "family interest" rights from "government bestowed" rights. The Court, for example, has upheld filing fees for indigents in cases concerning welfare appeals [*Ortwein* v. *Schwab*, 410 U.S. 656 (1973)] and bankruptcy petitions [*United States* v. *Kras*, 409 U.S. 434 (1973)]. However, filing fees in divorce actions have been struck down as a denial of due process. *Boddie* v. *Connecticut*, 401 U.S. 371 (1971). In distinguishing these holdings, the Court has stated that the interest in welfare and bankruptcy entitlements has "far less constitutional significance" than the interest in marital dissolution at issue in the *Boddie* case. *Ortwein* v. *Schwab*, *supra*, 410 U.S. at 659. *Accord*, *Stanley* v. *Illinois*, *supra*, 405 U.S. at 651 (parents' interest in the upbringing of their children "comes to this Court with a respect lacking when appeal is made to liberties which derive merely from shifting economic arrangements").

A termination of parental rights is the ultimate legal infringement upon the family. There are few, if any, state imposed deprivations more unyielding and personal than the permanent and irrevocable loss of one's children. As a federal court has observed: "[T]he loss of one's child may be the severest form of punitive sanction." *Brown* v. *Guy*, 476 F. Supp. 771, 773 (D. Nev. 1979).[3] Deprivations of this magnitude have prompted the Court, under Due Process analyses, to confer counsel rights on indigent criminal defendants [*Gideon* v. *Wainwright*, 372 U.S. 335 (1963)], as well as juveniles charged with delinquent behavior [*In re Gault*, 387 U.S. 1 (1967)].

Unlike other custody proceedings, termination orders are irrevocable and nonmodifiable. The cessation of parental rights and duties is total: parents lose any right to visit or communicate with the child; they may no longer participate in fundamental decisions which influence their children's rearing, such as schooling, medical treatment, and religious affiliation; or more intimate, daily decisions like diet, curfews, and vacation plans. Even the right to receive notice of legal proceedings affecting their child is lost. *E.g.*, N.C. Gen. Stat. § 7A-289.33 (Cum. Supp. 1979). In short, the severance is absolute and permanent; it is as if the parent-child relationship never existed.

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[3] The equation of termination of parental rights with penal sanctions is a reoccurring theme throughout state court decisions which have vested parents with a right to counsel. *See, In re Howard*, 382 So. 2d 194, 198 (La. Ct. App. 1980); *Danforth* v. *State Dep't of Health and Welfare*, 303 A.2d 794, 800 (Me. 1973); *In re Adoption of R.I.*, 455 Pa. 29, 30, 312 A.2d 601, 602 (1973); *State ex rel. Lemaster* v. *Oakley*, 203 S.E. 2d 140, 144 (W. Va. 1974). Congress has also, in its considerations of the Indian Child Welfare Act of 1978 [25 U.S.C. § 1901] concluded that "the removal of a child from the parents is a penalty as great, if not greater, than a criminal penalty. . . ." H. Rep. No. 95-1386, 95th Cong., 2d Sess. 22 (1978).

B. Risk of Error/Additional Safeguard.

Given the high value placed on family integrity and the severe consequences of its breakdown, stringent procedural safeguards are essential to minimize the risk of erroneous deprivation of parental rights. Under the North Carolina procedure now at issue, the petitioner, an indigent mother, was denied the right to counsel at public expense. It is this denial which makes the procedures constitutionally infirm.

The possibility of error in a termination of parental rights dispute runs high. Unlike the decisions at stake in *Mathews* v. *Eldridge, supra,* 442 U.S. at 343, those involved here are neither "sharply focused" nor "easily documented." Consequently, judges "may find it difficult, in utilizing vague standards like 'the best interests of the child,' to avoid decisions resting on subjective values." *Smith* v. *OFFER, supra,* 431 U.S. at 835 n. 36. As Mr. Justice Stevens noted:

> "That standard [best interest of child] provides little real guidance to the judge, and his decision must necessarily reflect personal and societal values and mores. . . ." [*Bellotti* v. *Baird,* 443 U.S. 622, 655 (1979) (concurring opinion).]

Due to this lack of guidance and broad-based standards, the same factual situation frequently supports contrary judicial interpretations, a fact confirmed by a recent study. In this study, three experienced juvenile court judges were handed fifty case files on real families and asked if the parents' rights to their children should be terminated. The judges concurred in less than one-half of the cases. Moreover, even when they agreed, "the judges did not identify the same factors, as determinants, each seeming to rate to some extent within his own

unique value system." Mnookin, *Foster Care—In Whose Best Interest?* 43 Harv. Educ. Rev. 599, 620 (1973).[4]

A recent national survey of our foster care system supports this finding. After conducting regional hearings and listening to more than 400 witnesses, the National Commission on Children in Need of Parents concluded:

> "[T]he confused, arbitrary and subjective handling of parental rights cases by the courts [is] a major reason why children spend their critical years adrift in foster care. . . ." [*Who Knows? Who Cares? Forgotten Children in Foster Care* 10 (1979).]

In light of the high stakes involved, these cases call for counsel to assist parents.[5] Skilled counsel is needed to execute basic advocacy functions: to delineate the issues, investigate and conduct discovery, present factual contentions in an orderly manner, cross-examine witnesses, make objections and preserve a record for appeal. In the context of termination proceedings, *pro se* litigants cannot adequately perform any of these tasks. Indeed, parents against whom the state moves to terminate parental rights are perhaps even less able to represent themselves than most lay citizens. A recent study found that such parents have, on the average, minimal educa-

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[4] According to one commentator, termination decisions rest primarily on the judge's "personal assessment—an assessment which may be subject to his personal biases and idiosyncracies." Consequently, "different judges in the same state are likely to respond differently to the same set of facts." DeFrancis, V., *Termination of Parental Rights—Balancing the Equities* (1971).

[5] Although an indigent parent should be entitled to both notice and appointment of counsel by the court, the parent may waive this right. However, such waiver must be deliberately and knowingly made. *Faretta* v. *California*, 422 U.S. 806, 835 (1975). *Cf.*, Indian Child Welfare Act of 1978, 25 U.S.C. §§ 1901, 1912(b) (Indian custodian or parent in a termination proceeding "shall have the right" to court appointed counsel).

tion backgrounds. Schetky, Morrison, & Sack, *Parents Who Fail: A Study of 51 Cases of Termination of Parental Rights*, 18 J. Am. Acad. Child Psych. 366 (1979).[6]

The statutory basis for the original termination order in this case demonstrates the need for legal counsel. The following is, in part, the statutory ground for termination that was applied:

> "The parent has *willfully* left the child in foster care . . . without showing to the satisfaction of the court that *substantial progress has been made* . . . in correcting those conditions which led to the removal of the child for neglect or without showing *positive response* . . . to the *diligent efforts of a county department of social services . . . to encourage the parent to strengthen the parental relationship* to the child or to make and follow through with *constructive planning* for the child." [N.C. Gen. Stat. § 7A-289.32(3) (Cum. Supp. 1979) (emphasis added).][7]

This complex statute necessitates the participation of counsel to identify and frame legal and factual issues. The italicized language suggests several areas upon which trained counsel might focus, either to hold the state to

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[6] *See, also,* A. Gruber, *Children in Foster Care, Destitute, Neglected . . . Betrayed* 137 (1979). In fact, a frequent ground for state intervention into the family is the parent's mental incapacity. Wald, *State Intervention on Behalf of Neglected Children: A Search for Realistic Standards*, 27 Stan. L. Rev. 985, 1021 (1975). For a discussion of the need for legal representation for parents in these cases, *see,* Besharov, *Parents in Child Protective Proceedings: The Emergent Right to Counsel*, in ADVOCATING FOR CHILDREN IN THE COURTS 22 (1979); Catz and Kuelbs, *The Requirement of Appointed Counsel for Indigent Parents in Neglect or Termination Proceedings: A Developing Area*, 12 J. Fam. L. 223 (1973-74).

[7] Juvenile Petition at 1-2. *See* Appendices to Reply to Respondent's Brief in Opposition, Appendix I at 2.

its burden of proof or to mount an affirmative defense. For example, the attorney might assert a lack of "diligent efforts" by the public agency to encourage the "parent to strengthen the parental relationship." In fact, many lower court termination orders have been reversed as a result of the agency's failure to assist the family;[8] the *pro se* litigant is not likely to know that supportive services by the state are legally mandated. Parents, untutored in the law, can, at best, deny the allegations of the state; seldom does their limited legal sophistication lead to the reframing of issues before the court.

Pro se litigants cannot adequately conduct investigations and pre-trial discovery. The initial step in the investigation of a termination case by parents' counsel typically involves obtaining a copy of the agency case file. This file contains critical information: an account of the agency's activities, the identity of potential expert and lay witnesses, and reports or summaries of reports from police, mental health personnel, physicians and other professionals. Without the assistance of counsel a parent might not even secure a copy of this file;[9] the parent may be ignorant of proper discovery avenues such

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[8] *See, e.g., Arizona State Dep't of Economic Security* v. *Mahoney*, 24 Ariz. App. 534, 540 P.2d 153 (1975); *In re Taylor*, 30 Ill. App. 3d 906, 334 N.E.2d 194 (1975); *In re Kimberlin I.*, 421 N.Y.S.2d 649 (1979); *In re Christopher H.*, 577 P.2d 1292 (Okla. 1978); *Weaver* v. *Roanoke Dep't of Human Resources*, 265 S.E. 2d 692 (Va. 1980). In North Carolina, the Governor's Advocacy Council on Children and Youth reported that 50% of the natural parents surveyed claimed they never received services after their children were placed in foster care. *Why Can't I Have a Home? A Report on Foster Care and Adoption in North Carolina* 48-49 (1978). This lack of services to families is a common characteristic throughout the country. Children's Defense Fund, *Children Without Homes* 15-21 (1979).

[9] Some state statutes and regulations specifically authorize release of agency case reports only to attorneys. *See, e.g.*, Or. Rev. Stat. § 419.657(2) (1979).

as making a request for the production of evidence, scheduling a deposition, or serving a subpoena *duces tecum*. Even at trial the parent may never view the file, or will be unable to use it as a weapon, *e.g.*, as the basis of impeaching a witness.

The disadvantages to *pro se* litigants becomes more visible at trial. Already weakened by incomplete investigation and ignorant of trial procedures, parents are unable to introduce factual contentions in support of their fitness in an orderly and legally persuasive manner. Aggravating this inability are the very complex issues which arise in termination actions. These actions involve the diagnosis of the parent-child relationship, a current analysis of the mental and emotional capacity of the parent to care for the child, and a prognosis of future parental abilities. Unlike most criminal or personal injury actions, which look to the guilt or innocence, or liability or non-liability of the defendant arising from a single incident, termination actions examine conduct over the long term and then attempt to predict future behavior. Accordingly, parents must often secure and present expert testimony from physicians, psychiatrists, psychologists and clinical social workers. Their very ability to obtain these experts is suspect; they may be unaware of diagnostic evaluation services, often secured by court order [*e.g.*, N.C. Gen. Stat. § 7A-289.30(b) (Cum. Supp. 1979)], or that they can subpoena experts who have personal knowledge of the case.

Assuming expert witnesses are identified and secured, the parent, unschooled in the art of direct examination, faces insurmountable obstacles. Some of the trouble spots include: qualifying the expert, framing hypothetical questions, avoiding leading questions, and eliciting permissible expert opinion. Examining lay witnesses may also pose problems. Without a firm grasp of the legal issues,

the questioning may only produce irrelevant ramblings.[10] Similarly, the lay litigant will rarely make persuasive opening and closing statements. The instant case illustrates this point; the petitioner's closing argument was as follows: "I don't think it's right." Trial tr. 61.

Unrepresented parents cannot conduct effective cross-examination. When confronting expert witnesses of the state, they will passively accept the alleged expert's credentials, overlook potential biases and generally fail to discredit the expert opinion. Indeed, such failures are preordained as lay litigants do not comprehend the rudiments of cross-examination, let alone its art. Again, the instant case highlights the futility of a parent's cross-examination:

> THE COURT: All right. Do you want to ask her any questions?
> MS. LASSITER: About what? About what she . . .
> THE COURT: About this child.
> MS. LASSITER: Oh, yes.
> THE COURT: All right. Go ahead.
>
> CROSS EXAMINATION by MS. LASSITER:
>
> The only thing I know is that when you say . . .
> THE COURT: I don't want you to testify.
> MS. LASSITER: Okay.
> THE COURT: I want to know whether you want to cross-examine her or ask any questions.

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[10] The trial transcript in the instant case amply depicts this problem. The petitioner was unable to examine her sole witness (her mother); the trial judge had to undertake the questioning. Without benefit of prior interviews and case preparation, even the judge could not conduct a cogent direct examination. Ultimately, in frustration, he forsook further questioning, admitting that it was "just wasting time" because the witness was "skipping from one subject to another." Trial transcript 52 (hereinafter cited as Trial tr.). The trial transcript has been lodged with the Clerk of this Court.

MS. LASSITER: Yes, I want to. Well, you know the only thing I know about is my part that I know about it. I know . . .

THE COURT: I am not talking about what you know. I want to know if you want to ask her any questions or not.

MS. LASSITER: About that?

THE COURT: Yes. Do you understand the nature of this proceeding?

MS. LASSITER: Yes, I know.

THE COURT: Are there any questions you want to ask her about what she has testified to?

MS. LASSITER: Yes.

THE COURT: All right. Go ahead.

Q: I want to know why you think that you are going to turn my child over to a foster home? He knows my mother and he knows all of us. He knows her and he knows all of us.

THE COURT: Who is he?

Q: My son, William.

A: Ms. Lassiter, your son has been in foster care since May of 1975 and since that time . . .

Q: Yeah, yeah and I didn't know anything about it either.

[Trial tr. 19-20.]

Without meaningful cross-examination, the risk of error in these cases substantially increases. Judges will rely more heavily upon the state's unchallenged presentation. Such reliance is ill-advised; study after study has revealed that child welfare workers carry too many cases, have little training, and maintain minimal contacts with their client-families. National Commission on Children in Need of Parents, *supra*, at 15; Levine, *Caveat Parens: A Demystification of the Child Protection System*, 35 U. Pitt. L. Rev. 1, 14-15 (1973).

Unaided by counsel, parents likewise cannot raise objections and exclude improper evidence submitted by the state. Unopposed by a trained adversary, the attorney for the state may employ incompetent evidence and bend

ordinary trial procedures. Here, respondent's case was predominantly based upon the following evidence: findings from an earlier court proceeding at which petitioner was not present and for which only hearsay was relied upon to show that she had received notice [Trial tr. 17, 30, 31, 32, 33, 42]; the agency case record which, although hearsay, was never described, offered into evidence or made an exhibit to the proceedings [Trial tr. 11, 12, 13, 18, 19]; and other hearsay testimony by the state's sole witness, the social services worker [Trial tr. 14, 15].

The trial transcript of this case, as a whole, is an eloquent example of the inability of uneducated litigants to function in the court system without legal representation. Further testimony to the critical role of counsel in these cases may be found in a case study which contrasted the dispositions between parents with and without counsel in temporary custody and termination proceedings.[11] A New Jersey Court, in examining the results of this study, stated that "the conclusion seems inescapable that a significant number of cases against unrepresented parents result in findings of neglect solely because of absence of counsel. . . ." *Crist* v. *Division of Youth and Family Services*, 128 N.J. Super. 402, 320 A.2d 203, 208 (1974), *quoting* Note, *Child Neglect: Due Process for the Parent*, 70 Colum. L. Rev. 465, 467 (1970).

C. Countervailing Interests.

In cases where additional due process rights have been sought, a frequent countervailing interest articulated by the government is the financial cost to the public. The state's fiscal interest may take precedence only if counsel is not essential to a fair hearing, or if the parent's interest in a fair hearing is *de minimis*. Otherwise, the Court

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[11] Note, *Representation in Child Neglect Cases: Are Parents Neglected?* 4 Colum. J.L. & Soc. Prob. 230, 241 (1968).

has rejected economic arguments as adequate justification for withholding procedures necessary to protect fundamental rights of citizens. *Goldberg* v. *Kelly*, *supra*, 397 U.S. at 265-66; *Watson* v. *City of Memphis*, 373 U.S. 526, 537 (1963). *Cf.*, *Cleavor* v. *Wilcox*, 499 F.2d 940, 945 (9th Cir. 1974) (society's and parent's interest in maintaining family integrity outweighs state's interest in saving money).

This Court's own assessment of the need for counsel addresses the first concern; parents "hailed into court" and pitted against the vast resources and legal means of the state "cannot be assured a fair trial unless counsel is provided for [the parent]." *Gideon* v. *Wainwright*, *supra*, 372 U.S. at 344. *See* Part II B, *supra*. Adhering to this rationale, one United States District Court recently opined:

> "When the State intrudes with its vast resources in an attempt to disassemble [the parent-child relationship], then every safeguard under the law must be abundantly exercised by the Court to guarantee that the inherent imbalance of experience and expertise between the parent and state is minimized . . . . [O]ne of the essentials would be to put the parent in a near equal position as far as counsel is concerned with the State." [*Brown* v. *Guy*, 476 F. Supp. 771, 773 (D. Nev. 1979).]

Furthermore, the Court's consistent holdings instruct that a parent's liberty interest in the preservation of family integrity is far from *de minimis*. See Part I, *supra*.[12]

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[12] In any event, the state should move with extreme caution before terminating parental rights; its own ability to act as a surrogate parent has been widely assailed. Areen, *Intervention Between Parent and Child: A Reappraisal of the State's Role in Child Abuse and Neglect Cases*, 63 Geo. L. Rev. 887, 899 (1975); Wald, *State Intervention on Behalf of Neglected Children: A Search for Realistic Standards*, 27 Stan. L. Rev. 985, 994 (1975). Even though the state's underlying motive in moving for termina-

This combination of important parental rights and fair hearing requirements has prompted a majority of states, by legislative [13] or court [14] decree, to provide counsel for indigent parents in these proceedings. In addition, Congress has granted this right to Indian parents in child welfare-related proceedings.[15]

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tion of parental rights is to free the child for adoption, termination may occur in most states before there are potential adoptive parents. And studies have confirmed that the longer the child remains in foster care, the less likely are his chances of being adopted. D. Fanshel and E. Shinn, *Children in Foster Care: A Longitudinal Investigation* 120-121 (1978); H. Maas and R. Engler, *Children in Need of Parents* 421 (1959).

[13] *See, e.g.*, Ariz. Rev. Stat. Ann. § 8-225 (Supp. 1980); Cal. Civ. Code Ann. § 237.5 (West Supp. 1980); Kan. Stat. Ann. § 38.820 (Supp. 1979); N.Y. Soc. Ser. Law § 384-a (McKinney Supp. 1979). For a complete statutory listing *see* Petitioner's Brief on the Merits.

[14] These decisions, granting counsel rights to indigent parents in termination proceedings, all rest upon due process considerations. *Dep't of Public Welfare* v. *J.K.B.*, 393 N.E.2d 406 (Mass. 1979); *In re Friesz*, 190 Neb. 347, 208 N.W.2d 259 (1973); *Crist* v. *Division of Youth and Family Services*, 128 N.J. Super. 402, 320 A.2d 203 (1974); *In the Matter of B.*, 30 N.Y.2d 352, 334 N.Y.S.2d 133, 285 N.E.2d 288 (1972); *Matter of Chad S.*, 580 P.2d 983 (Okla. 1978); *State* v. *Jamison*, 251 Or. 114, 444 P.2d 15 (1968); *In re Adoption of R.I.*, 455 Pa. 29, 312 A.2d 601 (1973); *In re Welfare of Myricks*, 85 Wash. 2d 252, 533 P.2d 841 (1975); *State ex rel. Lemaster* v. *Oakley*, 203 S.E.2d 140 (W. Va. 1974). In recent years, the right to counsel has also been extended to indigent parents on appeal of termination orders. *See, e.g., In Interest of Brehm*, 3 Kan. App. 2d 325, 594 P.2d 269 (1979); *In re Welfare of Luscier*, 84 Wash. 2d 135, 524 P.2d 906 (1974). More recently, the South Carolina Supreme Court has recognized a constitutional right to transcripts on appeal of these orders. *South Carolina Dep't of Social Services* v. *Wilson*, 49 U.S.L.W. 2291 (Nov. 4, 1980).

[15] Indian Child Welfare Act of 1978, 25 U.S.C. § 1912(b) (Supp. 1980).

In the remaining jurisdictions, the public cost of providing counsel should be small. According to the National Center for State Courts, only four states—North Dakota, Rhode Island, Alaska, and Iowa—compile data on termination caseloads. For calendar year 1977, North Dakota reported 177 termination cases filed, as compared with 17,691 misdemeanor and felony cases.[16] For that same year, Rhode Island reported 133 termination petitions but nearly 30,000 criminal arraignments.[17] In 1978, Alaska reported 14 termination of parental rights dispositions in the superior courts as opposed to 905 felony and 240 "other criminal case" dispositions,[18] while the Iowa Judiciary indicated 947 termination petitions filed in comparison to 27,942 "regular criminal cases."[19] In these states, the termination of parental rights caseload ranges from about four-hundredths of a percent to a little over three and a third percent of the criminal docket.

Under *Gideon* and its progeny, the state must already provide counsel to indigent criminal defendants. The above comparative statistics suggest that the additional cost of providing counsel to parents in termination proceedings would be relatively minor.

III. THE RIGHT OF PARENTS TO COUNSEL HAS BEEN INCORPORATED INTO STANDARDS OF THE AMERICAN BAR ASSOCIATION AND OTHER ORGANIZATIONS.

In February 1979, the House of Delegates of the American Bar Association adopted a set of Juvenile Jus-

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[16] *State of North Dakota—North Dakota Judicial Council Annual Report Calendar Year 1977*, at 24, 29, 31.

[17] *1977 Report on the Judiciary State of Rhode Island*, at 31, 33.

[18] *Alaska Court System: 1978 Annual Report*, at C-61, C-13, C-28.

[19] *1978 Annual Statistical Report, Iowa Judiciary*, at 67, 76.

tice Standards developed by a joint commission of the Association and the Institute of Judicial Administration. One of these volumes, entitled *Standards Relating to Counsel for Private Parties*, states, as its first principle:

> "The participation of counsel on behalf of all parties subject to juvenile and family court proceedings is essential to the administration of justice and to the fair and accurate resolution of issues at all stages of those proceedings." *Id.* at § 1.1.

A later section in this volume specifies that: "Counsel should be available to the respondent parents . . . in a neglect or dependency proceeding. . . . Counsel should be available at all stages of such proceedings and in all proceedings collateral to neglect and dependency matters . . . ." *Id.* at § 2.3(b). The Commentary makes clear that a termination case may be collateral to a neglect or dependency proceeding, especially in cases similar to the one now before the Court, where the termination petition arises from an earlier neglect holding. N.C. Gen. Stat. § 7A-289.32(3) (Cum. Supp. 1979).

The underlying rationale for this Standard is explained in the Commentary. Loss of custody of one's child is viewed as a more severe consequence than penalties associated with most civil actions. As a result, the greater procedural protections afforded criminal defendants, *e.g.*, counsel, are more appropriate in actions which affect the right to custody. Furthermore, since the state is the adversary, "there is a gross inherent imbalance of experience and expertise between the parties if the parents are not represented by counsel." *Id.* at 72.

The Model Adoption Legislation and Procedures Advisory Panel has reached a similar recommendation.[20]

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[20] The Model Adoption Legislation and Procedures Advisory Panel was established pursuant to the Child Abuse Prevention and Treatment and Adoption Reform Act, 42 U.S.C. §§ 5101, 5112 (1978), as an independent expert panel to recommend to the Secre-

Under the proposed *Model State Adoption Act and Model State Adoption Procedures*, indigent parents subject to involuntary termination of parental rights proceedings must be notified of their right to counsel and, if they so request, appointed counsel. *Id.* §§ 311, 317. Numerous other model acts and standards echo this principle. *See e.g.*, National Conference of Commissioners on Uniform State Laws, *Uniform Juvenile Court Act* § 26 (1968); National Advisory Committee on Criminal Justice Standards and Goals, *Juvenile Justice and Delinquency Prevention* Standard 16.6 (1976); National Council of Juvenile Court Judges, Neglected Children Committee, *Model Statute for Termination of Parental Rights* § 6 (1976); Katz, *Freeing Children for Permanent Placement Through a Model Act* § 12(a) (1978).

The above Standards and Model Acts are, of course, not binding upon this Court. They represent, however, the considered judgment of many knowledgeable and disinterested persons concerned with a serious problem throughout the nation. As such, their recommendations are, we submit, entitled to substantial weight.

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tary of the United States Department of Health, Education and Welfare model legislation and procedures relating to adoption, with special attention to barriers to the adoption of special needs children. The Panel is composed of a state legislator, state child welfare administrator, a juvenile court judge, a birth parent, adoptive parent, and others with expertise in child welfare. The model law as submitted by the Panel to the Secretary has been published for public comment, 45 Fed. Reg. 10622 (1980).

CONCLUSION

In view of the foregoing, the American Bar Association urges this Court to hold that indigent parents, in proceedings to terminate their parental rights, are entitled under the Fourteenth Amendment Due Process Clause to counsel at public expense.

Respectfully submitted,

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